UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter STAA Cases

October 2005

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002
(202) 693-7500
www.oalj.dol.gov

John M. Vittone
Chief Judge

Thomas M. Burke
Associate Chief Judge
for
Black Lung and
Traditional

[STAA Whistleblower Digest II D 1]
MOTION TO AMEND COMPLAINT TO INCLUDE MORE RECENT EVENTS; ALJ'S LACK OF AUTHORITY TO COMPEL OSHA INVESTIGATION

In ***Ass't Sec'y & Freeze v. Consolidated Freightways, Inc.***, ARB No. 04-128, ALJ No. 2002-STA-4 (ARB Aug. 31, 2005), OSHA had determined that the complaint was untimely. The ALJ agreed, but remanded to OSHA to permit the Complainant to amend the complaint to include allegations based on more recent events. OSHA found in favor of the Complainant based on the amended complaint. The parties agreed that the OSHA findings and order should be made final, and the ALJ issued an order to that effect. The ALJ also later issued an order approving attorney's fees. The ARB construed the ALJ's orders as a recommended decision and order on the merits. The ARB found that it was required to issue the final order, and issued an order to show cause why the ALJ's order should not be approved. The Complainant's counsel responded that it would not be filing a brief and the the Respondent did not respond at all. The ARB affirmed the ALJ's decisions. In a footnote, the ARB stated:

> Inasmuch as neither STAA nor its implementing regulations vest ALJs with authority to compel OSHA to conduct investigations, the better course for the ALJ would have been to dismiss the untimely complaint.

> Freeze could then have filed a new and timely complaint with OSHA that OSHA would have investigated. *See* 49 U.S.C.A. § 31105(b)(2)(A). OSHA's investigative findings and Preliminary Order could then have become final by operation of law when, as happened here, neither party objected. *See* 49 U.S.C.A. § 31105(b)(2)(B).

Slip op. at n.3.

[STAA Whistleblower Digest V A 2]
PROTECTED ACTIVITY UNDER SECTION 31105(a)(1)(A); PREPONDERANCE OF THE EVIDENCE; LACK OF CORROBORATING EVIDENCE

The ALJ weighed the testimony concerning whether the Complainant had raised the issue of over hours driving with the dispatcher or in a meeting with supervisors about his failure to deliver a load. The ALJ found that the Complainant did not establish by a preponderance of the evidence that he had made aN internal complaint protected by subsection (A) because no evidence corroborated the Complainant's version of events and because the dispatcher's and supervisors' testimony was as credible as that of the Complainant. The ARB found that the record supported these findings and affirmed the ALJ. ***Hilburn v. James Boone Trucking***, ARB No. 04-104, ALJ No. 2003-STA-45 (ARB Aug. 30, 2005).

[STAA Whistleblower Digest V B 2]
PROTECTED ACTIVITY UNDER SECTION 31105(a)(1)(B)(I); REFUSAL TO DRIVE REQUIRES PROOF OF ACTUAL VIOLATION; PREPONDERANCE OF THE EVIDENCE STANDARD

Section 31105(a)(1)(B)(i) prohibits an employer from retaliating because an employee refuses to drive when to do so would violate a commercial motor vehicle regulation. A refusal to drive under that subsection is protected only if the record establishes that the driving actually would have violated the motor vehicle regulation at issue. A good faith belief does not suffice. In the instant case, the Complainant failed to establish by a preponderance of evidence that driving would have actually resulted in a violation of the 70 hour/8-day driving rule where substantial evidence supported the ALJ's findings that driver's logs did not support the claim, that the Complainant's estimates and recollections were not reliable because his testimony was one year and nine months after the fact, there was conflicting testimony on key points, and different combinations of the evidence rendered different results on whether the rule would have been violated. ***Hilburn v. James Boone Trucking***, ARB No. 04-104, ALJ No. 2003-STA-45 (ARB Aug. 30, 2005).

[STAA Whistleblower Digest IV B 2 e]
LEGITIMATE NONDISCRIMINATORY REASONS FOR TERMINATION; LACK OF RELATIONSHIP BETWEEN DISCIPLINE AND MOTOR VEHICLE SAFETY

The Complainant alleged that he was discharged because his back condition made him unable to complete his work assignments due to restrictions on his ability to perform lifting due to a back condition (i.e., inability to assist in unloading the truck).

The ARB -- having affirmed the ALJ's finding that the inability to work due to lifting restrictions was not protected activity because there was no connection between the lifting restrictions and motor vehicle safety regulations -- found no unlawful discrimination under the STAA. ***Safley v. Stannards, Inc.***, ARB No. 05-113, ALJ No. 2003-STA-54 (ARB Sept. 30, 2005).

[STAA Whistleblower Digest V B 2]
PROTECTED ACTIVITY; WORK REFUSAL; ANALYSIS UNDER THE "ACTUAL VIOLATION" AND "REASONABLE APPREHENSION" SUBSECTIONS

The STAA protects two categories of work refusal, commonly referred to as the "actual violation" and "reasonable apprehension" subsections. While 49 U.S.C.A. §31105(a)(1)(B)(i) deals with conditions as they actually exist, 49 U.S.C.A. §31105(a)(1)(B)(ii) deals with conditions as a reasonable person would believe them to be. Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances and the particular requirements of each of the provisions. The actual violation category may be applicable if the operation of the vehicle would have violated the DOT "fatigue rule" at 49 C.F.R. § 392.3 (2003). A complainant must prove that there would be an actual violation of the specific requirements of this rule; mere good-faith belief in a violation is insufficient. The reasonable apprehension category is applicable if the complainant has an objectively reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition, which may include a driver's physical condition, including fatigue. ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005).

[STAA Whistleblower Digest V B 2 a iv]
PROTECTED ACTIVITY; WORK REFUSAL; ACTUAL VIOLATION; QUALITY OF SLEEP

The ARB affirmed the ALJ's finding that the Complainant had failed to establish that he was so tired that driving would actually violate the DOT fatigue rule where the Complainant testified that he needed six hours of sleep in a 24 hour period to function adequately, and the evidence showed that he had accumulated more than six hours of sleep in the period before the two dispatches at issue. The ALJ had considered the Complainant's evidence of scientific studies about the quality of fragmented and daytime sleep, the effect of environmental conditions, and being awakened during a principal sleep period, but nonetheless found that the Complainant had not established that there would have been an actual violation of the DOT rule. ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005).

[STAA Whistleblower Digest V B 2 a iv]
PROTECTED ACTIVITY; WORK REFUSAL; DELIBERATE FAILURE TO GET ENOUGH REST; RESPONDENT'S COMPLIANCE WITH RULES

The ALJ construed *Ass't Sec'y & Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 1996-STA-23 (ARB June 12, 1998), as compelling a finding that the Complainant was not engaged in protected activity by refusing a dispatch where he deliberately made himself unavailable for work by not taking advantage of time off to get enough rest. The ARB found that the ruling in *Porter* had created some confusion -- that it

did not create a per se exception to the fatigue rule -- rather evidence that the complainant made himself unavailable for work is only one factor to consider. Similarly, a finding that the respondent's operating rules and procedures comply with hours of service regulations or that the respondent did not contribute to the complainant's fatigue do not necessarily remove STAA protection. ***Eash v. Roadway Express, Inc.***, ARB No. 04-036, ALJ No. 1998-STA-28 (ARB Sept. 30, 2005).

[STAA Whistleblower Digest V B 2 a v]
PROTECTED ACTIVITY; INFORMING THE EMPLOYER ABOUT A SEDATIVE PRESCRIPTION MEDICATION; INABILITY TO UNLOAD

The Complainant did not engage in protected activity merely by informing his employer about having been prescribed a medication for a back condition that had possible sedative side effects where the physician who prescribed the medication had not imposed any driving restrictions, the Complainant had not taken the medication that date and was not experiencing any side effects, the Complainant had indicated that he could safely complete his driving assignment that day, and he in fact did safely complete the drive. Similarly, the Complainant did not engage in protected activity when he voiced a concern about not being able to unload furniture due to a back condition. ***Safley v. Stannards, Inc.***, ARB No. 05-113, ALJ No. 2003-STA-54 (ARB Sept. 30, 2005).

[STAA Whistleblower Digest IX A]
REINSTATEMENT; STATUTORY REMEDY REQUIRES ALJ TO MAKE FINDINGS

The ARB remanded where the ALJ had made no findings on the question of reinstatement. The ARB noted that reinstatement is a statutory remedy but that there may be circumstances in which reinstatement is impossible or impractical. The ARB also vacated the ALJ's back pay award, finding that it may be necessary for the ALJ to recalculate given that there was scant evidence about the Complainant's earnings with the Respondent, that the Complainant had only worked for the Respondent for 10 days, that there was no agreement for future work, and that considerable time had passed since the complaint. ***Palmer v. Triple R Trucking***, ARB No. 03-109, ALJ No. 2003-STA-28 (ARB Aug. 31, 2005).

[STAA Whistleblower Digest XI A 1]
DISMISSAL; WITHDRAWAL TO PURUE STATE REMEDIES CONSTRUED AS WITHDRAWAL OF OBJECTIONS TO OSHA FINDINGS

In ***Wallace v. R & L Carriers***, ARB No. 04-098, ALJ No. 2002-STA-40 (ARB Aug. 30, 2005), the ARB affirmed the ALJ's treatment of the Complainant's notice that he wished to withdraw his request for a hearing in order to pursue possible state remedies as a request to withdraw objections to the Area Director's findings under 29 C.F.R. § 1978.111(c).